Donald James Rae & Anor v Bruno Sorrentino and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(IM)(NCVC)-1105–05 OF 2013 AND W-02(NCVC)(W)-1553–07 OF 2013
ALIZATUL KHAIR, ABDUL AZIZ ABD RAHIM AND VARGHESE GEORGE JJCA
26 AUGUST 2014

Contract — Agreement — Breach — Shares — Redeemable cumulative preference shares — Non-issuance of shares within seven days of stipulated agreement — Claim for payment — Whether payment made was personal loan — Parties privy to agreement — Whether there was cause of action

The plaintiff entered into a subscription agreement with the third defendant and agreed to subscribe for 250,000 redeemable cumulative preference shares ('the RCPS') in the third defendant. The RCPS shares were priced at USD1 per share. The said agreement was signed by the plaintiff on the one hand and the second defendant on the other. The plaintiff instructed his bank (Citibank Singapore Ltd) to remit the sum of USD250,000 into the third defendant's bank account. However, the third defendant did not issue the RCPS shares to the plaintiff within seven days from the date of the said agreement as provided. Some few years after the said agreement, one John Tong was instructed by the plaintiff to issue and according to him did so issue a demand to the third defendant for the RCPS shares. Subsequently, almost six years later, the plaintiff's present solicitors issued a letter of demand to the first and second defendants alleging that the payment of USD250,000 was a personal loan and that the latter had allegedly offered to pay to the plaintiff a sum of USD375,000. The first and second defendants denied the allegations and asserted that the said agreement was strictly between the third defendant and the plaintiff. Exactly six years after the said agreement was entered into the writ and statement of claim was filed. Judgment in default of appearance was entered into against the third defendant. The plaintiff alleged that the defendants have until to date failed to pay to the plaintiff the said sum of USD375,000 and/or any part of it. Thus the plaintiff now demanded from the defendants, jointly and severally for the amount of RM1,211,625. The first and second defendants contended that on the face of the pleadings there was no valid cause of action recognised in law against the first and second defendants.

Held, allowing the appeal with costs of RM30,000:

(1) This was not an appropriate case for disposal by way of O 14A in the light of the conflicting allegations of facts contained in the affidavit of both parties. In this case the facts in issue were interwoven with the legal issues raised and as such the judge was correct in dismissing the O 14A application and in ordering the matter to proceed to trial (see paras 25–26).

(2) The judge was, with respect, misconceived when she held that there was in existence two separate contractual relationship, one for a personal loan of USD250,000 between the plaintiff and the first and second defendants and the second the subscription agreement between the plaintiff and the third defendant when the evidence and pleadings did not support the same (see para 29).

(3) What the plaintiff had agreed to do to help was to invest in his company by subscribing for the 250,000 RCPS shares. That explained why the plaintiff specifically instructed PW1 to draft the said agreement in such a manner, that was, without any mention of any personal liability on the part of the first and second defendants to repay the so called 'personal loan' of USD250,000. It was inconceivable if there was such a loan that it was not reduced in writing with its terms clearly spelt out, in particular the terms of repayment given that the amount involved was fairly substantial (see para 37).

(4) As the plaintiff had, by his own admission paid the USD250,000 into the third defendant's bank account, instructed his solicitor to prepare, draft, faired the said agreement and subsequently signed the same, the plaintiff was therefore bound by the said agreement and all the terms contained therein including the entire agreement clause (see para 41).

(5) The judge misdirected herself when she accepted the plaintiffs' evidence that the USD250,000 was also a 'personal loan' to the first and second defendants when such evidence was clearly parol evidence as they contradicted and was inconsistent with the clear terms of the said agreement, and therefore inadmissible (see para 42).

(6) In allowing the plaintiff's claim, the judge failed to appreciate that there was no agreement by the first and second defendants to be held jointly and severally liable for the third defendant's breach of the terms of the said agreement. There was no basis in fact and in law for the court to find the first and second defendants jointly and severally liable for the third defendant's breach (see para 50).

[Bahasa Malaysia summary

Plaintif memasuki perjanjian penyertaan dengan defendan ketiga dan bersetuju untuk membeli 250,000 saham keutamaan boleh tebus ('RCPS') dalam defendan ketiga. Saham RCPS diletakkan harga pada USD1 per saham.

Perjanjan tersebut ditandatangani oleh plaintif di sebelah pihak dan defendan kedua pihak lagi satu. Plaintif mengarahkan banknya (Citibank Singapore Ltd) untuk meremit jumlah sebanyak USD250,000 ke dalam akaun bank defendan. Walau bagaimanapun, defendan ketiga tidak mengeluarkan saham RCPS kepada plaintif dalam masa tujuh hari dari tarikh perjanjian tersebut seperti diperuntukkan. Beberapa tahun kemudiannya selepas perjanjian tersebut, seorang bernama John Tong diarahkan oleh plaintif untuk mengeluarkan dan menurutnya mengeluarkan tuntutan kepada defendan ketiga untuk saham RCPS tersebut. Kemudiannya, hampir enam tahun selepas itu, peguamcara plaintif yang terkini mengeluarkan surat tuntutan kepada defendan-defendan pertama dan kedua mendakwa bahawa bayaran sebanyak USD250,000 adalah pinjaman peribadi dan bahawa defendan-defendan pertama dan kedua telah menawarkan untuk membayar kepada plaintif sejumlah USD375,000. Defendan-defendan pertama dan kedua menafikan dakwaan tersebut dan berhujah bahawa perjanjian tersebut adalah secara ketat antara defendan ketiga dan plaintif. Tepat enam tahun kemudian selepas perjanjian tersebut dimasuki writ dan pernyataan tuntutan difailkan. Penghakiman ingkar kehadiran dimasukkan terhadap defendan ketiga. Plaintif mendakwa bahawa defendan-defendan telah sehingga hari ini gagal untuk membayar kepada plaintif jumlah sebanyak USD375,000 tersebut dan/atau apa-apa bahagiannya. Oleh itu plaintif sekarang menuntut daripada defendan-defendan, bersesama dan berasingan untuk jumlah sebanyak RM1,211,625. Defendan-defendan pertama dan kedua berhujah bahawa atas piliding tiada kausa tindakan sah yang diterima dari segi undang-undang terhadap defendan-defendan pertama dan kedua.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM30,000:

(1) Ini bukan kes wajar untuk pelepasan melalui A 14A berdasarkan dakwaan fakta bercanggah yang terdapat di dalam afidavit kedua-dua pihak. Dalam kes ini fakta dalam isu adalah berhubung dengan isu undang-undang yang berbangkit dan oleh itu hakim adalah betul dalam menolak permohonan A 14A dan dalam memerintahkan perkara tersebut diteruskan kepada perbicaraan (lihat perenggan 25–26).

(2) Hakim adalah, dengan hormat, salah tanggap apabila dia memutuskan bahawa terdapat kewujudan dua hubungan kontraktual berasingan, satu untuk pinjaman peribadi sebanyak USD250,000 antara plaintif dan defendan-defendan pertama dan kedua dan kedua perjanjian penyertaan antara plaintif dan defendan ketiga apabila keterangan dan pliding tidak menyokongnya (lihat perenggan 29).

(3) Apa yang dipersetujui oleh plaintif untuk membantu adalah untuk melabur dalam syarikatnya dengan membeli saham RCPS sebanyak 250,000. Ini menjelaskan mengapa plaintif secara spesifik mengarahkan PW1 untuk mendrafkan perjanjian tersebut sedemikian, ini adalah,

tanpa apa-apa sebutan mengenai apa-apa liabiliti peribadi oleh pihak defendan-defendan pertama dan kedua untuk membayar balik 'personal loan' sebanyak USD250,000 tersebut. Adalah sukar untuk mempercayai jika ada pinjaman sedemikian yang tidak ditulis dengan terma-terma jelas dinyatakan, terutamanya terma-terma bayaran balik kerana jumlah yang terlibat adalah agak besar (lihat perenggan 37).

(4) Seperti yang dibuat oleh plaintif, melalui pengakuannya sendiri membayar USD250,000 ke dalam akuan bank defendan ketiga, mengarahkan peguamcaranya untuk menyediakan draf, mengadili perjanjian tersebut dan kemudiannya menandatanganinya, plaintif oleh itu terikat oleh perjanjian tersebut dan kesemua terma-terma yang terdapat di dalamnya termasuk keseluruhan klausa perjanjian (lihat perenggan 41).

(5) Hakim telah tersalah arah apabila beliau menerima keterangan plaintif bahawa USD250,000 adalah juga 'personal loan' kepada defendan-defendan pertama dan kedua apabila keterangan sedemikian adalah jelas keterangan lisan memandangkan ia bertentangan dan tidak konsisten dengan terma-terma jelas perjanjian tersebut, dan oleh itu tidak boleh diterima (lihat perenggan 42).

(6) Dalam membenarkan tuntutan plaintif, hakim gagal untuk menilai bahawa tidak terdapat perjanjian oleh defendan-defendan pertama dan kedua untuk bertanggungan secara bersesama dan berasingan bagi kemungkiran terma-terma perjanjian defendan ketiga. Tiada asas dari segi fakta dan undang-undang untuk mahkamah mendapati defendan-defendan pertama dan kedua bertanggungan secara bersesama dan berasingan untuk kemungkiran defendan ketiga (lihat perenggan 50).]

Notes

For a case on breach, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 2962.

Cases referred to

Alcatel-Lucent (M) Sdn Bhd (formerly known as Alcatel Network Systems (M) Sdn Bhd) v Solid Investments Ltd and another appeal [2012] 4 MLJ 72, CA (refd)

Bato Bagi & Ors v Government of the State of Sarawak [2011] 6 CLJ 387, CA (refd)

Chase Perdana Bhd v Md Afendi bin Hamdan [2009] 6 MLJ 783, FC (refd)

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517, FC (folld)

Law Kam Loy and Anor v Boltex Sdn Bhd and Others [2005] MLJU 225, CA (refd)

Nortel Networks (Asia) Ltd (formerly known as Northen Telecom (Asia) Ltd) &

Ors v Sapura Holdings Sdn Bhd & Ors [2012] 6 MLJ 491; [2012] 8 CLJ 296, CA (distd)
Ricardo G Tapel v Polar Twin Advance (M) Sdn Bhd (Nicholas Lee Zse Young & Anor, third parties) [2013] 9 MLJ 69, HC (refd)
Salomon v A Salomon & Co Ltd [1897] AC 22, HL (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)

Legislation referred to

Evidence Act 1950 ss 91, 92
Rules of the High Court 1980 O 14A, O 14A r 1

Appeal from: Civil Suit No 22 NCVC–956–09 of 2011 (High Court, Kuala Lumpur)

Trevor George De Silva (Caroline George and Shalini Yeap with him) (Trevor George Partnership) for the appellants.
Desmond KL Ng (Tan Meng Tze with him) (Shui-Tai) for the respondent.

Alizatul Khair JCA:

[1] These two appeals were heard together:

(a) W-02(IM)NCVC)-1105–05 of 2013; and

(b) W-02(NCVC)(W)-1553–07 of 2013.

[2] Appeal 1105 was the first and second appellant's (the first and second defendants in the court below) appeal against the decision of the learned High Court judge who had dismissed their application to have the case disposed of by way of O 14A r 1 (encl 33). Appeal 1553 was the first and second appellant's appeal against the decision of the learned High Court judge who had allowed the respondent's claim with costs after a full trial.

[3] In this judgment the parties will be referred to as they were referred to in the High Court.

MATERIAL FACTS

[4] The undisputed material facts were as follows.

[5] On 29 September 2005 the plaintiff entered into a subscription agreement with Aeronimbus Holdings Ltd (the third defendant in the court below) ('the said agreement'). Under the said agreement the plaintiff agreed to subscribe for 250,000 redeemable cumulative preference shares ('the RCPS') in the third defendant. The RCPS shares were priced at USD1 per share. The said

agreement contained the following salient terms:

(i) Clause 3 (Completion)

> 3.1 Completion of the application and subscription of the RCPS shares shall take place ... within seven (7) days of the date hereof or such other date as may be mutually agreed between the parties hereto, as the case may be (hereinafter referred to as 'the Completion Date').
>
> 3.2 On the Completion date, the following shall take place concurrently:-
>
> 3.2.1 the SUBSCRIBER (i.e. the Plaintiff) shall subscribe for the RCPS shares and shall deliver to the Company a cashier's order banker's draft or cheque drawn on a licensed bank (or such other mode of payment as the Parties may agree in writing) made out in favour of the Company for the sum of *United States Dollar Two Hundred and Fifty Thousand (USDRM250,000)*.
>
> 3.2.2 The Company shall effect the allotment and issue of the RCPS shares to the SUBSCRIBER and the Company shall deliver the definitive share certificates for the RCPS shares to or as may be directed by the SUSCRIBER.

(ii) Clause 4 (Warranties)

Aeronimbus Ltd represents and warrants and undertakes in the terms set-out in the First Schedule, *inter alia*, authority and capacity of the Company, allotment and issue of the RCPS shares, accuracy and adequacy of information, Group Company etc.;

(iii) Clause 8 (Entire Agreement)

This Agreement constitutes the entire agreement between the parties pertaining to its subject matter, subject however to any amendments, modifications or supplements as may be agreed pursuant to Clause 9; and

(iv) Appendix 1 (Terms of the RCPS)

(1) The RCPS shares of the Company shall confer on the holder the right to a fixed cumulative preferential dividend at the rate of twenty five percent (25%) per annum as the nominal value of those RCPS shares ... (Emphasis added.)

[6] The said agreement was drafted, prepared and faired by the plaintiff's solicitor at the material time, one, John Tong of M/s Shui-Tai ('the plaintiff's present solicitors') and not by the defendants or their solicitors.

[7] The said agreement was signed by the plaintiff on the one hand and the second defendant (as director of the third defendant) on the other.

[8] By letter dated 23 September 2005, the plaintiff instructed his bank (Citibank Singapore Ltd) to remit the sum of USD250,000 into the third defendant's bank account.

[9] However the third defendant did not issue the RCPS shares to the plaintiff within seven days from the date of the said agreement (ie 29 September 2005) as provided therein or even thereafter. Some few years after the said agreement, the said John Tong was instructed by the plaintiff to issue and according to him did so issue a demand to the third defendant for the RCPS shares. Subsequently, almost six years later, the plaintiff's present solicitors issued a letter of demand dated 20 September 2011 to the first and second defendants alleging that the payment of USD250,000 was a personal loan and that the latter (the first and second defendants) had allegedly offered to pay (to the plaintiff) in March 2006 a sum of USD375,000.

[10] By letter dated 22 September 2011 from their solicitors, the first and second defendant denied the allegations and asserted that the said agreement was strictly between the third defendant and the plaintiff.

[11] On 29 September 2011, exactly six years after the said agreement was entered into the writ and statement of claim was filed.

[12] On 12 January 2012, judgment in default of appearance was entered into against the third defendant.

THE PLAINTIFF'S PLEADED CASE

[13] To appreciate the issue confronting the court in dealing with these two appeals it is perhaps necessary to set-out the plaintiff's pleaded case against the defendants.

[14] Based on the plaintiff's amended statement of claim the plaintiff's claim against the first and second defendants were as follows:

(a) sometime in September 2005, the plaintiff at the request of the first and second defendants had given a personal loan of USD250,000 to both the first and second defendants for the purpose of their financing the third defendant wherein the said sum of USD250,000 was banked into the third defendant's account as per the first and second defendant's request (see para 6 of the amended statement of claim);

(b) in return, the first and second defendants had agreed to procure the third defendant to issue a total of 250,000 RCPS shares of USD1 each at an issue price of USD1 per share pursuant to a subscription agreement

dated 29 September 2005 signed between the plaintiff and the third defendant (see para 7 of the amended statement of claim);

(c) the first and second defendants have procured or caused the aforesaid breaches and/or have failed to remedy the aforesaid breaches (see para 12 of the amended statement of claim); and

(d) the first and second defendants had sometime in March 2006, offered to pay an amount of USD375,000 as compensation to the plaintiff for the aforesaid breaches and/or as repayment of the said personal loan (see para 13 of the amended statement of claim).

[15] As against the third defendant the plaintiff's pleaded case was that:

(a) inter alia, the terms of the said agreement (as agreed by the defendants) was that the third defendant was to deliver within seven days from the date of the said agreement, the RCPS shares certificate for the sum of USD250,000 to the plaintiff (see para 8 of the amended statement of claim);

(b) the third defendant was also to pay a fixed cumulative preferential dividend at the rate of 25%pa on the normal value of the RCPS shares to the plaintiff and to redeem back the RCPS shares (see para 9 of the amended statement of claim);

(c) the third defendant had breached the terms of the said agreement and has failed to deliver the RCPS shares certificate for the said sum of USD250,00 or payment until todate (see para 10 of the amended statement of claim); and

(d) the third defendant had further breached the said agreement by failing to pay any dividend and to redeem back the RCPS shares (see para 11 of the amended statement of claim).

(The 'aforesaid breaches' mentioned in para 14(c) and (d) above refer to the alleged breaches by the third defendant as set-out in para 15(a)–(d) above).

[16] The plaintiff alleged that the defendants have until todate failed to pay to the plaintiff the said sum of USD375,000 and/or any part of it.

[17] Thus the plaintiff 'now demands from the Defendants, jointly and severally for the amount of:-

(a) RM1,211,625.00;

(b) Interest at the rate of 4% per annum on the amount of RM 1,211,625.00 from the date of this summons till the date of full settlement;

(c) Costs; and

(d) Any other relief deemed reasonable by this Honourable Court.'

O 14A APPLICATION (APPEAL 1105)

[18] Based on the plaintiff's pleaded case and the material undisputed facts set-out above, the first and second defendants contended that on the face of the pleadings there was no valid cause of action recognised in law against the first and second defendants. They accordingly filed an O 14A application for the court to determine the following questions of law:

(1) whether the plaintiff has a maintainable cause of action in law against the first and second defendants who, at all material times, had acted as directors and/or shareholders and/or were agents of the third defendant company; and

(2) whether, having entered a judgment in default against the third defendant on 12 January 2001 for, inter alia, USD375,000 the second and third defendants can be liable to the plaintiff for the same claim.

[19] Upon the determination of the aforesaid questions of law, the first and second defendants prayed that the plaintiff's claim against them as pleaded on the amended statement of claim be dismissed with costs.

[20] The gist of the first and second defendant's submission in support of their application for O 14A was briefly as follows.

[21] With regard to Question 1 the first and second defendants' contended that the pleadings revealed no cause of action against the first and second defendants:

(a) the first and second defendants were pleaded as directors and shareholders of the third defendant and therefore they could not under the law be liable for the latter's breach of the said agreement;

(b) the plaintiff's claim that there were two existing contractual relationship, that is, the first being a personal loan to the first and second defendant to finance the third defendant and the second, the said agreement with the third defendant not only 'flies in the face of contemporaneous documents' but was also at odds with their pleadings;

(c) in para 6 of the statement of claim, the plaintiff agreed that the alleged personal loan was for the purposes of financing the third defendant. Paragraph 7 of the statement of claim states that the said agreement was between the plaintiff and the third defendant. Clause 3.2.1 of the said

agreement clearly provides that the sum of USD250,000 was meant as an investment by the plaintiff in the company and not as a personal loan as alleged;

(d) no evidence of the alleged oral agreement can be admitted to contradict or vary the terms of the said agreement by virtue of ss 91 and 92 of the Evidence Act 1950; and

(e) the said agreement was signed by the first and second defendants as directors of the third defendant. The fact that the first and second defendants signed the said agreement on behalf of the third defendant does not make them personally liable. The plaintiff did not plead any facts to justify the lifting of the corporate veil.

[22] With regard to Question 2, it was the first and second defendants' contention that no material facts have been pleaded to show that the first and second defendants were jointly and severally liable with the third defendant.

[23] Learned counsel argued that based on the above grounds it was clear that the plaintiff's amended statement of claim did not disclose a reasonable cause of action against the first and second defendants and submitted that both Questions 1 and 2 ought to be determined in their favour.

THE HIGH COURT'S DECISION

[24] The learned judge on 7 February 2013 dismissed the O 14A application on the basis that 'this was not a plain and simple matter that can be determine (sic) without a full trial'. In the learned judge's view this case involved material dispute of facts which required both oral and documentary evidence to be adduced. In this regard the learned judge referred to the affidavits filed by both parties which revealed conflicting allegations of facts, in particular, as regards the alleged personal loan of USD250,000. To quote the learned judge:

> Extrinsic evidence therefore must be led to prove the purpose of the plaintiff remitting the USD250,000 to the third defendant, whether it was to lend to the first and second defendants and not for investment in the third defendant company.

OUR DECISION

[25] We agreed with the learned judge that this was not an appropriate case for disposal by way of O 14A in the light of the conflicting allegations of facts contained in the affidavit of both parties. The Court of Appeal in the fairly recent case of *Bato Bagi & Ors v Government of the State of Sarawak* [2011] 6 CLJ 387 at p 396 spelt out in clear and distinct terms the scope of O 14A:

> It is well settled that an issue is only suitable for determination under O 14A if the points of law to be determined thereunder have been stated in clear and precise

terms, and the facts disclosed by the pleadings and affidavits evidence are sufficient for the court to make such determination which would be final as to the entire cause or matter, (see *Allen Gulf Oil Refining Ltd* [1980] QB 156, and *Seloga Jaya Sdn Bhd v UEM Genisys Sdn Bhd* [2008] 2 CLJ 686). The facts involved in the determination of the said issues are not in dispute and would not require further adjudication or resolution by the court, (see *Law Hock Key & Anor v Yap Meng Kan & Ors* [2008] 3 CLJ 470).

On the contrary, an issue is not suitable for determination under O 14A if its is sensitive to the facts and the issues of facts are interwoven with the legal issues raised, (see *TSC Europe (UK) Ltd v Massey* [1999] 1 RLR 22) ....

[26] We were of the view that in this case the facts in issue were interwoven with the legal issues raised and as such the learned judge was correct in dismissing the O 14A application and in ordering the matter to proceed to trial. We therefore dismissed the appeal and affirmed the learned judge's decision.

THE FULL TRIAL (APPEAL 1553)

[27] As stated earlier, the learned judge had, at the conclusion of the trial allowed the plaintiff's claim with costs. In arriving at her decision the learned judge, inter alia, found as follows:

On the totality of the evidence adduced by the plaintiff, it is my view that the plaintiff has on the balance of probabilities proved by direct and documentary evidences that *there exist two contractual relationships between the parties. The first* being the personal loan of USD250,000 for the purpose of the first and second defendants: This agreement exists between the plaintiff the first and second defendants: The *second* being the subscription agreement the plaintiff and the third defendant: The two contractual relationships must be distinguished and not to be taken as one and the same. The second contractual relationship came subsequent to the plaintiff agreeing to grant the personal loan which was remitted prior to the making of the subscription agreement. (Emphasis added.)

[28] The defendants argued that the learned judge misdirected herself in law in arriving at the above finding due to the following reasons:

(a) firstly, there was no reference at all in the pleadings as to the terms of the alleged 'personal loan' of USD250,000 and the consideration for the same.

In addition 'repayment term' which is an essential constituent of any loan contract was also not pleaded. Learned counsel relied on the case of *Ricardo G Tapel v Polar Twin Advance (M) Sdn Bhd (Nicholas Lee Zse Young & Anor, third parties)* [2013] 9 MLJ 69 as authority for this proposition;

(b) secondly, the learned judge failed to judicially appreciate that, as the

plaintiff had made only one payment of USD250,000, there could not exist, as a matter of law two valid and independent contracts, regardless of the plaintiff's evidence at the trial;

(c) thirdly, the question of whether the alleged 'personal loan' or the said agreement was a collateral contract did not arise as 'collateral contract' was not pleaded in the plaintiff's statement of claim;

(d) fourthly, the learned judge erred in holding, based on her finding that there were two separate contracts for the USD250,000 that the 'the provision of section 91 and 92 of Act SO do not apply and the Plaintiff is not restricted from proving and claiming the personal loan by using extrinsic evidence', as such parol evidence clearly contradicted and was inconsistent with the terms of the said agreement; and

(e) the court was wrong in allowing the plaintiff's claim for USD365,000 or RM1,211,625. The first and second defendants contended that the court erred when it failed to appreciate that such payment was more than what the plaintiff was entitled to under the said agreement. In addition if indeed it was true as testified by the plaintif that he had 'immediately accepted the offer of USD375,000.00 as the sum was more than the 25% dividend promised by the Defendants', the plaintiff would have specifically pleaded it in their statement of claim but this was never done.

OUR DECISION

[29] In respect of this appeal, we agreed with the first and second defendants' submission that based on the reasons set-out above the learned judge was, with respect, misconceived when she held that there was in existence two separate contractual relationship, one for a personal loan of USD250,000 between the plaintiff and the first and second defendants and the second the subscription agreement (the said agreement) between the plaintiff and the third defendant when the evidence and pleadings did not support the same. We accordingly allowed the appeal and set aside the learned judge's decision.

[30] By way of elaboration we would state the following.

The learned judge in her judgment referred to the oral testimony of the plaintiff, 'PW1' (the said John Tong) and 'PW2' (the plaintiff's ex wife) to support her finding.

[31] The plaintiff had testified that the loan (of USD250,000) was given to help the first defendant 'his dearest friend whom he trusted like a brother'. He further testified that the first defendant assured him that he would give his money back within six months or a year. He said he did not expect anything in return except for the payment back of the loan sum within six months to one

year assured by the first defendant. Based on the aforesaid assurance the plaintiff said he did not require any personal guarantee from the first and second defendants.

[32] The plaintiff in his oral testimony also explained that although the loan was meant to be a personal loan to the first and second defendants, the plaintiff nevertheless agreed to enter into the said agreement with the third defendant due to the first defendant's insistence who assured him that the business of the third defendant would become profitable in the short run and the company (the third defendant) was able to deliver the shares and the dividends.

[33] The plaintiff further stated that he did not require any personal liability to be imposed on the first and second defendants to repay the loan so long as he received the money back within six months or a year and that was the specific instruction given to PW1 who drafted the said agreement.

[34] PW1 in his evidence confirmed such instruction and testified that the said agreement did not make any reference to the personal liability of the first and second defendants because the said agreement was between the plaintiff and the third defendant and the plaintiff did not wish the personal loan to be in writing.

[35] As for PW2's evidence, she merely repeated what the plaintiff had told her, that is, the third defendant was not doing very well and needed funding.

[36] PW2 was also told that the third defendant had cash flow problems and the first defendant had asked the plaintiff for a loan of USD250,000. As the learned judge herself observed 'PW2 was oblivious of the details of the loan of USD250,000.00' except that she knew that it was actually given out either to the first or second defendants.

[37] It was clear from the above evidence that what the plaintiff had agreed to do to help 'his dearest friend whom he trusted like a brother' (the first defendant) was to invest in his company by subscribing for the 250,000 RCPS shares. That explained why the plaintiff specifically instructed PW1 to draft the said agreement in such a manner, that is, without any mention of any personal liability on the part of the first and second defendant to repay the so called 'personal loan' of USD250,000. It was inconceivable, in our view, if there was such a loan that it was not reduced in writing with its terms clearly spelt out, in particular the terms of repayment given that the amount involved was fairly substantial. It was held in *Ricardo G Tapel* that a 'repayment term' was an essential element necessary to constitute a loan contract as a cause of action to recover such loan could only arise upon the failure or refusal to pay on the due date or agreed date.

[38] No such terms have been pleaded by the plaintiff in their pleadings where the only averment in relation to the alleged personal loan is found in para 6 of the plaintiff's amended statement of claim and it reads as follows:

> Sometime in September 2005, the Plaintiff was at the request of the First Defendant and the Second Defendant, given a personal loan of USD250,000.00 to both the First and the Second Defendants for the purpose of their financing the Third Defendant wherein the said sum of USD250,000.00 was banked into the Third Defendant's account as per the First and Second Defendant's request.

In the absence of any contemporaneous documentary evidence evincing such a personal loan the learned judge's finding that there was in existence such a loan was clearly unsustainable.

[39] Further it was not legally tenable for the plaintiff to plead the USD250,000 as a 'personal loan' to the first and second defendants (para 6 of the statement of claim) when the very same sum was pleaded as the consideration for the subscription of the 250,000 RCPS shares under the said agreement with the third defendant.

[40] It was not possible for both contractual relationships to exist when there was only one payment of USD250,000 made by the plaintiff.

[41] As submitted by the first and second defendants based on the said pleadings the premise of the plaintiff's case appeared to be as follows.

If the third defendant had issued the 250,000 RCPS shares certificates then there could not be a personal loan to the first and second defendant. But because the third defendant failed to issue the said shares certificate then the payment of USD250,000 becomes a 'personal loan'.

In law however a contract comes into existence at the time it was made, which, as pleaded by the plaintiff, would in this case be before the said agreement was signed. Once the said agreement was signed such a contract (assuming there was one) must, as a matter of law, have been substituted or replaced by the said agreement.

Indeed, as the plaintiff had, by his own admission paid the USD250,000 into the third defendant's bank account, instructed his solicitor to prepare, draft, faired the said agreement and subsequently signed the same, the plaintiff was therefore bound by the said agreement and all the terms contained therein including the entire agreement clause (cl 8) which for convenience is reproduced again below:

> ENTRE AGREEMENT
>
> This Agreement constitutes the entire agreement between the parties pertaining to its subject matter, subject however to any amendments, modifications or supplements as may be agreed upon pursuant to Clause 9.

(Clause 9 provides that any such amendment, modification or supplement must be by way of writing and signed by all parties to the said agreement). A

[42] That being the case, the learned judge misdirected herself when she accepted the plaintiff's evidence that the USD250,000 was also a 'personal loan' to the first and second defendants when such evidence was clearly parol evidence as they contradicted and was inconsistent with the clear terms of the said agreement, and therefore inadmissible, (see s 92 of the Evidence Act 1950 and the Federal Court decision of *Chase Perdana Bhd v Md Afendi bin Hamdan* [2009] 6 MLJ 783 and *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229). B C

[43] It needs to be reemphasised that the plaintiff's cause of action as pleaded in their amended statement of claim was for breach of the terms of the said agreement, inter alia, due to the failure of the third respondent: D

(a) to deliver the RCPS shares certificate within seven days from the said agreement;

(b) to pay a fixed cumulative preferential dividend at the rate of 25%pa on the nominal value of the RCPS shares to the plaintiff; and E

(c) to redeem back the RCPS shares.

[44] Given the plaintiff's pleaded cause of action and the clear factors as to why such parol evidence was obviously contradictory and inconsistent with the terms of the said agreement the learned judge was patently wrong in holding that, as the plaintiff had established that there was in existence a contract for a personal loan the plaintiff was therefore not barred from 'proving and claiming the personal loan by using extrinsic evidence' and consequently the provisions of ss 91–92 of the Evidence Act 1950 were not applicable. F G

[45] We further found the learned judge erred in holding the first and second defendants liable for the aforesaid breaches as the learned judge failed to appreciate that the third defendant upon its incorporation acquired a separate legal personality altogether from its members (see *Salomon v A Salomon & Co Ltd* [1897] AC 22 and *Alcatel-Lucent (M) Sdn Bhd (formerly known as Alcatel Network Systems (M) Sdn Bhd) v Solid Investments Ltd and another appeal* [2012] 4 MLJ 72). H

[46] While it has been accepted by high authority that the veil of incorporation can be lifted in equity in the interest of justice, such instances are 'special circumstances' and are by way of exception which require the particulars of such instances to be clearly pleaded. The judgment of His Lordship Gopal Sri Ram JCA (as he then was) in *Law Kam Loy and Anor v* I

Boltex Sdn Bhd and Others [2005] MLJU 225 is instructive:

> In any judgment, in the light of the more recent authorities such as *Adams v Cape Industries*, it is not open to the courts to disregard the corporate veil purely on the ground that it is in the interest of justice to do so. It is also my respectful view that *the special circumstances to which Lord Keith referred include cases where there is either actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity.*
>
> (Emphasis added.)

[47] In the present case all that the plaintiff had pleaded in their amended statement of claim was as follows:

> The First and Second Defendants *have procured or caused the aforesaid breaches and/or have failed to remedy the aforesaid breaches*.
>
> (See para 12 of the amended statement of claim). (Emphasis added.)

That in our view was insufficient to justify lifting the corporate veil. It is trite law that if the plaintiff were seeking to rely on any allegations that require the corporate veil to be lifted, such allegations must be specifically pleaded. In *Alcatel-Lucent*, the Court of Appeal held that:

> It is trite that parties are bound by their pleadings. For the court to lift the corporate veil, the said issue must be specifically pleaded by a litigant (see *Vallasamy Ponnusamy v Gurbachan Singh* [2006] 2 MLJ 715; [2006] 1 CLJ 805).

Therefore, the judgment of the learned judge ought to be set aside in this ground alone.

It was clear from the plaintiff's pleadings that this issue was never specifically pleaded.

[48] We also agreed with the first and second defendants that as regards the amount of USD375,000 allegedly offered by the first and second defendants to settle the matter, the learned judge erred in accepting the plaintiff's evidence that 'he immediately accepted the offer of USD375,000.00 as the sum was more than the 25% dividend promised by the defendants, and he perceived the offer to be the proposal by them to settle the personal loan and the third Defendant's obligations under the subscription agreement' as such payment was more than what the plaintiff was entitled to under the said agreement. Secondly, such 'acceptance' by the plaintiff as found by the learned judge was never specifically pleaded as it ought to have been to show that there was indeed a concluded and enforceable agreement with regards to the alleged offer to settle.

[49] Finally the plaintiff had claimed in their statement of claim that the first and second defendants were jointly liable to pay the plaintiff the amount claimed, that is RM1,211,625 together with interest and cost.

[50] In allowing the plaintiff's claim above, the learned judge with respect failed to appreciate that there was no agreement by the first and second defendants to be held jointly and severally liable for the third defendant's breach of the terms of the said agreement, as admitted by PW1 and PW3 in their evidence at the trial. There was therefore no basis in fact and in law for the court to find the first and second defendants jointly and severally liable for the third defendant's breach.

[51] For the above reasons, we would agree with the first and second defendants that there was 'insufficient judicial appreciation by the learned Judge of the pleadings, contemporaneous evidence, and preponderance of logic and probabilities of the case' when she allowed the plaintiff's claim. In this regard we find the observations of the Court of Appeal in *Nortel Networks (Asia) Ltd (formerly known as Northen Telecom (Asia) Ltd) & Ors v Sapura Holdings Sdn Bhd & Ors* [2012] 6 MLJ 491; [2012] 8 CLJ 296 particularly apposite:

> We find in coming to her finding that there was a collateral contract, the learned JC had not sufficiently appreciated the provisions of s 92 of the Evidence Act and the contemporaneous documentary evidence. The alleged oral representations were directly inconsistent with the provisions of the distributorship agreements ... it was not permissible for the learned JC to admit the oral evidence of PW1 which contradicts the written agreements. Further, we agreed ... that the agreements being contemporaneous ought to be preferred to the oral evidence of PW1 which was given 30 years after the alleged representations ... the alleged oral representations, even if made, were superceded five years later by the written distributorship agreement ... We find that PW1 ... after his in-house lawyers had studied and vetted the same, as evidence that the plaintiffs had accepted and agreed to be bound by the agreement ....

[52] Applying the principle enunciated in *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517, we were of the view that this was a fit and proper case for appellate intervention. We therefore allowed the appeal and set aside the learned judge's decision. We awarded costs of RM30,000 to the appellant and ordered the deposit to be refunded.

Appeal allowed with costs of RM30,000.

Reported by Afiq Mohamad Noor